

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA ex rel. THOMAS J.
MILLER, ATTORNEY GENERAL OF
IOWA,

Plaintiff,

vs.

ADSA, INC. d/b/a American Deputy
Sheriff's Association, a Texas not-for-profit
corporation, MICHAEL CROFT,
ASHLEY ISAAC THOMAS BUCHMAN,
EULALEE WARNER, PUBLIC
AWARENESS INC., a Wisconsin
Corporation and DUANE KOLVE,

Defendants.

Case No. CE 49813

RULING AND ORDER

This case was before the court on March 4, 2005 for hearing on the Defendants' Motion to Dissolve and Vacate Injunction or Modify Injunction and the Plaintiff's Motion to Modify Temporary Injunction. Assistant Attorney General Steve St. Clair represented the Plaintiff (the "State") and attorneys Scott E. Schutzman and John Conger represented all of the Defendants (collectively "ADSA") except Public Awareness, Inc. ("PAI") and Duane Kolve. Neither PAI nor Kolve appeared, nor anyone on their behalf. Having considered the evidence and the parties' written and oral arguments, the court makes the following ruling.

Procedural History and Issues Presented

The Petition, filed November 10, 2004, alleges that ADSA has engaged in fund raising activities in Iowa that constitute "consumer frauds" under Iowa Code §714.16 (2005). The Petition seeks a temporary and permanent injunction, money damages, money penalties and other relief. On the same day the Petition was filed this court entered an *ex parte* temporary injunction prohibiting ADSA from violating chapter 714 and from making specified representations in connection with its

fund raising activities. On December 1, 2004, acknowledgements or acceptances of service were filed showing service on each Defendant of the original notice, Petition and temporary injunction.¹ On January 26, 2005 ADSA filed the instant motion to dissolve the temporary injunction. The State filed its motion to modify the temporary injunction on February 23, 2005.

ADSA challenges the temporary injunction on the grounds that (1) it was issued without notice and without a showing of a legitimate reason why notice should not be required; (2) the State did not post a bond; (3) there was no showing of irreparable harm; (4) there was no showing that the public would be harmed; (5) that ADSA did not engage in the acts alleged by the State that constitute consumer fraud; and (6) the temporary restraining order is unconstitutionally vague, overbroad and ambiguous.

In its motion to modify the temporary injunction, the State asks that the court order ADSA to tape record all its fund raising telephone calls made to Iowa residents or made from Iowa so that its compliance with the temporary injunction can be monitored and confirmed.

Controlling Legal Principles

Section 714.16(7) specifically authorizes injunctive relief as follows:

If it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in a practice declared to be unlawful by this section, the attorney general may seek and obtain in an action in a district court a temporary restraining order, preliminary injunction, or permanent injunction prohibiting the person from continuing the practice or engaging in the practice or doing an act in furtherance of the practice.

The same section authorizes the court to enter orders “necessary to prevent the use or employment ... of any prohibited practice ...”

Section 714.16(2)(a) prohibits the use of any “deception, fraud, false pretense, false promise, or misrepresentation”, as well as the concealment or omission to state a material fact, in connection

¹ Defendant Michael Croft acknowledged service of the Petition only.

with soliciting funds for charitable purposes.

When a statute specifically authorizes the issuance of an injunction, only the statutory requirements for issuance of the injunction must be met, not the traditional requirements of irreparable harm and inadequate remedy. Iowa R. Civ. P. 1.1502(3); *Worthington v. Kenkel*, 684 N.W.2d 228, 232 (Iowa 2004). Iowa R. Civ. P. 1.1507 authorizes the issuance of an *ex parte* temporary restraining order where a reason is given supporting the issuance of such an injunction. Iowa R. Civ. P. 1.1509 permits a party against whom an *ex parte* temporary restraining order has been issued to have a hearing at any time on whether the injunction should be dissolved.

The party seeking an injunction has the burden of proving the facts necessary to support its issuance. *Kleman v. Charles City Police Dept.*, 373 N.W.2d 90, 95 (Iowa 1985). In determining whether there are facts that warrant the issuance of a temporary injunction, the court may consider evidence that would otherwise be inadmissible, such as affidavits. *Id.*

The State is not required to post security in civil matters. Iowa R. Civ. P. 1.207.

To meet due process standards, an injunction must define with reasonable specificity what it requires of the party against which it is issued. *Storm Sound Enterprises v. Keefe*, 209 N.W.2d 560, 566 (Iowa 1973).

Facts

For the purposes of this ruling, the court finds the following facts.²

- ADSA (or persons acting on its behalf, including specifically PAI) has made telephone calls into Iowa soliciting charitable donations from individuals. ADSA's stated charitable purpose is to support local law enforcement agencies by making grants to them for the purpose of purchasing law

² In making these fact findings the court has relied heavily, although not exclusively, on ADSA's own answers to the State's requests for information made during its investigation. To the extent there is conflicting evidence on a particular issue, the court has found the evidence supporting its fact findings more persuasive or credible than the evidence supporting a contrary finding. Additionally, ADSA's evidentiary objections are all overruled. To the extent otherwise inadmissible hearsay evidence has been admitted, the court has considered that

enforcement related equipment such as bullet proof vests. The solicitors acting on ADSA's behalf have consistently made the following representations, either explicitly or implicitly, during these phone solicitations:

- a. That the caller is a member of a law enforcement agency;
- b. That the calls originate from the locality where the solicited individual resides;
- c. That the donations would benefit the solicited person's local law enforcement agency;
- d. That the fundraising is part of an annual campaign;
- e. That most people donate \$25 or more.

These representations are false and misleading and are designed for the purpose, and made with the intent, of inducing the solicited persons to rely on them in deciding whether to make a donation.

Conclusions of Law

The request for a temporary injunction was supported by affidavit and a legitimate reason was stated to justify its issuance without prior notice under Iowa R. Civ. P. 1.1507. Under Iowa R. Civ. P. 1.201, the State was not required to post bond before the injunction could be issued.

The State was not required to show irreparable harm or that the public would be harmed in order to obtain the requested injunction. The State was required to demonstrate, by a preponderance of the evidence³, that ADSA has engaged in practices that would be consumer frauds under Iowa Code Chapter 714. Although the burden of proof is a preponderance of evidence, the attorney general has proven by clear and convincing evidence that ADSA has engaged in such practices, as described in the findings of fact.

the evidence is hearsay in determining what weight it should be given.

3 The applicable statute authorizes issuance of an injunction if it "appears" to the attorney general that a person is engaging in a consumer fraud. The section does not state or define the burden of proof that the attorney general must meet. Because no different burden is mandated by the statute the court concludes that a preponderance of evidence is necessary.

The temporary restraining order is not unconstitutionally vague. It describes with adequate particularity what it prohibits.

The State's motion to modify the injunction so as to require ADSA to tape record all phone call solicitations made to Iowa residents or made from Iowa should be granted. This is a requirement that is reasonably necessary to prevent ADSA from making deceptive solicitations. Moreover, ADSA has represented that it has directed that all phone solicitations made on its behalf be recorded in any event.

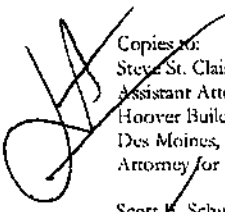
It is now, therefore, the order of the court that the Defendants' motion to dissolve the temporary injunction previously entered herein is denied.

The State's motion to modify the injunction is granted. The injunction is modified to add the following additional requirements: ADSA shall, and shall cause any person or entity acting on its behalf or for its benefit, in making solicitations for charitable donations by telephone, electronically record every such telephone call made into the State of Iowa for the purpose of making such a solicitation and shall, additionally, electronically record any such telephone call made from the State of Iowa regardless of the location to which the call is directed. Additionally, ADSA shall preserve all such recordings and make them available for inspection or copying by the State upon request of the attorney general to the extent that it enjoins the commission of an act that that the

IT IS SO ORDERED May 3, 2005.

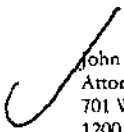

DOUGLAS F. STASKAL

Judge of the Fifth Judicial District of Iowa



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